No. 14-181

In The
Supreme Court of the United States

ALFRED GOBEILLE, in His Official Capacity as Chair of the Vermont Green Mountain Care Board,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSOR EDWARD A. ZELINSKY AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law of the Benjamin N. Cardozo School of Law of Yeshiva University.[1] He teaches and writes in the area of employee benefits and ERISA law, including the law of ERISA preemption. His ERISA-related writing has previously been cited by this Court.[2] As a teacher and a scholar, he has an interest in the clarification and sound development of the law of ERISA preemption.

SUMMARY OF ARGUMENT

This case is an opportunity for the Court to correct the three fundamental problems of current preemption jurisprudence under the Employee

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[1] Professor Zelinsky wrote this *amicus* brief as one of several projects he completed on a summer research grant from the Cardozo Law School. The views expressed in this brief are his personal views. Neither the Cardozo Law School nor Yeshiva University expresses any opinion on the issues addressed in this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* and Cardozo Law School made a monetary contribution to its preparation or submission. Both the petitioner and the respondent have, pursuant to Supreme Court Rule 37.3, submitted letters to the Clerk granting blanket consent for all *amicus curiae* briefs.

[2] *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 255 (2008) (citing Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L. J. 451 (2004)).

Retirement Income Security Act of 1974 (ERISA). First, unlike the lower courts and commentators, the Supreme Court has yet to acknowledge the tension between the seminal ERISA preemption decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and the subsequent decision in *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). Second, per *Travelers*, the Court has read ERISA's preemption clause, ERISA § 514(a), 29 U.S.C. § 1144(a), as nothing more than a codification of traditional, deferential preemption standards. This reading of § 514(a) is textually unpersuasive and renders ERISA §§ 514(b)(2)(A) and 514(b)(4), 29 U.S.C. §§ 1144(b)(2)(A) and 1144(b)(4), redundant. Section 514(a) is better read as establishing a presumption for preemption.

Third, *Travelers* asserts that the presumption against ERISA preemption applies with particular force to state regulation of an area like health care "which historically has been a matter of local concern." This judge-made rule also runs afoul of §§ 514(b)(2)(A) and 514(b)(4) which specifically exempt from ERISA preemption state banking, securities, insurance and criminal laws, but no other state laws.

The Court should acknowledge the tension between *Shaw* and *Travelers*, should resolve that tension by declaring that ERISA § 514(a) establishes a presumption for preemption, and should read ERISA §§ 514(b)(2) and 514(b)(4) as they were written to identify the only areas of state law protected from

that presumption. This framework should then be used to determine whether ERISA preempts Vt. Stat. Ann. tit. 18, § 9410 and the regulations thereunder.

ARGUMENT

I. The Court should confront the tension between *Shaw* and *Travelers*.

The Court should acknowledge and confront the tension between *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

Shaw construes ERISA as preempting expansively. Under *Shaw*'s capacious standard, ERISA § 514(a), 29 U.S.C. § 1144(a), preempts any state law which "has a connection with or reference to" an employee benefit plan. *Shaw*, 463 U.S. at 96-97. In contrast, *Travelers* defines ERISA preemption more restrictively. Under *Travelers*' narrower construction of § 514(a), ERISA does not preempt a state law merely because of "an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Travelers*, 514 U.S. at 659.

The tension between *Shaw* and *Travelers* has been widely noted by the lower courts (including the court below) and by commentators. *See, e.g.*, *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497, 506 (2d Cir. 2014) (*Travelers* "marked something of a pivot in

ERISA preemption."); *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 654 (9th Cir. 2008) ("We read *Travelers* as narrowing the Court's interpretation of the scope of § 514(a)."); Edward A. Zelinsky, Gobeille v. Liberty Mutual: *An Opportunity to Correct the Problems of ERISA Preemption*, 100 CORNELL L.REV. ONLINE ___ (2015) (forthcoming), available on SSRN at papers.ssrn.com/sol3/papers.cfm?abstract_id=2595589 (hereinafter, Zelinsky, Gobeille); Edward A. Zelinsky, Travelers, *Reasoned Textualism and The New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807, 827 (1999) (hereinafter, Zelinsky, Travelers); Lawrence A. Frolik & Kathryn L. Moore, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS 209-210 (3rd ed. 2012); John H. Langbein, et al., PENSION AND EMPLOYEE BENEFIT LAW 767 (6th ed. 2015).

The split in the Second Circuit panel below reflects the well-recognized tension between *Shaw* and *Travelers*. The expansive construction of ERISA § 514(a) advanced by *Shaw* buttresses the conclusion of the Second Circuit majority that ERISA preempts the Vermont law and regulation at issue in this case. In contrast, *Travelers'* more restrictive approach to ERISA preemption sustains the dissent below against such preemption.

The tensions reflected in Chief Judge Jacobs' opinion and Senior Judge Straub's dissent will recur until this Court confronts and resolves the tension between the disparate approaches to § 514(a) advanced in *Shaw* and *Travelers*.

II. ERISA § 514(a) should be construed as establishing a presumption for preemption.

Central to the tension between *Shaw* and *Travelers* is *Travelers'* reading of ERISA § 514(a) as a codification of traditional, deferential preemption standards. This reading of § 514(a) is unpersuasive and renders redundant ERISA §§ 514(b)(2)(A) and 514(b)(4). ERISA Section 514(a) is better read as establishing a presumption for preemption.

The problems with construing ERISA § 514(a) as embodying traditional preemption standards start with the text of § 514(a) itself. While the conventional judicial approach is a presumption against preemption, § 514(a) says nothing of the sort. Section 514(a) broadly states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any" employee benefit plan. This expansive statutory language says nothing about a presumption against preemption or about preserving state law.

The capacious language of § 514(a) contrasts with other federal preemption statutes which carefully preserve the prerogatives of the states. Zelinsky, Gobeille, *supra* (contrasting ERISA § 514 with other federal preemption clauses). As a textual matter, it is not persuasive to read the sweeping language of § 514(a) as creating a presumption for the preservation of state law. Congress knows how to write a statute preserving state law when it wants one.

ERISA Section 514(a) is not such a statute. Zelinsky, Gobeille, *supra*.

ERISA §§ 514(b)(2)(A) and 514(b)(4) compound the textual difficulty of reading § 514(a) as a presumption against preemption. Sections 514(b)(2)(A) and 514(b)(4) protect state insurance, banking, securities and criminal laws against the scope of § 514(a). If § 514(a) simply embodies the traditional presumption against preemption, from what are §§ 514(b)(2)(A) and 514(b)(4) protecting? Construing § 514(a) as creating the traditional presumption against preemption renders §§ 514(b)(2)(A) and 514(b)(4) redundant since, under that construction, there is nothing from which state banking, securities, insurance and criminal laws need relief.

As the Court observed in *Travelers*, an unqualified statutory phrase like "relate to" can be "taken to extend to the furthest stretch of its indeterminacy." *Travelers*, 514 U.S. at 656. However, there is an alternative reading of ERISA § 514(a) which gives content to that provision without reaching such indeterminacy: construe § 514(a) as a presumption for preemption. Zelinsky, Travelers, *supra* at 839.

Such an interpretation of ERISA § 514(a) also gives substance to the exceptions created in §§ 514(b)(2)(A) and 514(b)(4). If § 514(a) is understood as replacing the traditional presumption against preemption with a statutorily-mandated presumption for such preemption, §§ 514(b)(2)(A) and 514(b)(4) then relieve from this presumption for preemption

state insurance, banking, securities and criminal laws. That relief restores these four categories of state law back to the traditional presumption against preemption.

There is, in short, a way to respect the text of ERISA § 514(a) without yielding to either the problematic *Shaw*-based alternative of preemption without limit or the equally problematic approach under *Travelers* which deprives § 514(a) of any meaningful content: construe § 514(a) as establishing a presumption for preemption, a presumption from which state banking, securities, insurance and criminal laws are saved by §§ 514(b)(2)(A) and 514(b)(4). *See* Zelinsky, Travelers, *supra* at 832.

III. ERISA §§ 514(b)(2)(A) and 514(b)(4) exclusively define "matter[s] of local concern."

A central theme of *Travelers* is that ERISA preemption is inappropriate for state regulation of health care "which historically has been a matter of local concern." *Travelers*, 514 U.S. at 661. However, ERISA §§ 514(b)(2)(A) and 514(b)(4) outline the areas of state law to be protected from § 514(a)'s preemptive effect. Health care is not among these.

Postulating a judicially-determined sphere for historic matters of local concern renders §§ 514(b)(2)(A) and 514(b)(4) redundant. Nothing in these provisions indicates that the statutory list – state banking, securities, insurance and criminal laws – is merely

illustrative and may be augmented by other, judicially-recognized areas to be immunized from § 514(a)'s preemptive effect.

There may be a compelling case as a matter of policy for Congress to add health care to the areas protected from ERISA § 514(a)'s preemptive effect. There is, however, no warrant under § 514 as it now reads for the courts to reach that result in the teeth of the statute. Zelinsky, Gobeille, *supra*.

Under this framework, ERISA § 514(a) creates a presumption that the Vermont statute at issue in this case, Vt. Stat. Ann. tit. 18, § 9410, is preempted since that statute is not a state banking, securities, insurance or criminal law. The next and controlling inquiry is then whether Vermont can overcome that presumption.

CONCLUSION

The Court should acknowledge the tension between *Shaw* and *Travelers*, should resolve that tension by declaring that ERISA § 514(a) establishes a presumption for preemption, and should read ERISA §§ 514(b)(2)(A) and 514(b)(4) as they were written to identify the only areas of state law protected from that presumption. This framework should then be

used to determine whether ERISA preempts the Vermont statute and the regulations thereunder.

Respectfully submitted,

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